

Department of State

§ 120.42

or supply, except technology/technical data or software.

NOTE TO PARAGRAPH (a)(1): An example of a commodity that as a result of development has properties peculiarly responsible for achieving or exceeding the controlled performance levels, functions, or characteristics in a U.S. Munitions List category would be a swimmer delivery vehicle specially designed to dock with a submarine to provide submerged transport for swimmers or divers from submarines.

NOTE TO PARAGRAPH (b): The term “enumerated” refers to any article on the U.S. Munitions List or the Commerce Control List and not in a “catch-all” paragraph. A “catch-all” paragraph is one that does not refer to specific types of parts, components, accessories, or attachments, but rather controls parts, components, accessories, or attachments if they were specially designed for an enumerated item. For the purposes of the U.S. Munitions List, a “catch-all” paragraph includes the phrases “and specially designed parts and components therefor,” or “(parts, components, accessories, attachments, and associated equipment) specially designed for/to/with.”

NOTE 1 TO PARAGRAPH (b)(3): For the purpose of this definition, “production” means all production stages, such as product engineering, manufacture, integration, assembly (mounting), inspection, testing, and quality assurance. This includes “serial production” where commodities have passed production readiness testing (*i.e.*, an approved, standardized design ready for large scale production) and have been or are being produced on an assembly line for multiple commodities using the approved, standardized design.

NOTE 2 TO PARAGRAPH (b)(3): For the purpose of this definition, “development” is related to all stages prior to serial production, such as: design, design research, design analyses, design concepts, assembly and testing of prototypes, pilot production schemes, design data, process of transforming design data into a product, configuration design, integration design, layouts.

NOTE 3 TO PARAGRAPH (b)(3): Commodities in “production” that are subsequently subject to “development” activities, such as those that would result in enhancements or improvements only in the reliability or maintainability of the commodity (e.g., an increased mean time between failure (MTBF)), including those pertaining to quality improvements, cost reductions, or feature enhancements, remain in “production.” However, any new models or versions of such commodities developed from such efforts that change the basic performance or capability of the commodity are in “development” until and unless they enter into “production.”

NOTE 4 TO PARAGRAPH (b)(3): The *form* of a commodity is defined by its configuration

(including the geometrically measured configuration), material, and material properties that uniquely characterize it. The *fit* of a commodity is defined by its ability to physically interface or connect with or become an integral part of another commodity. The *function* of a commodity is the action or actions it is designed to perform. *Performance capability* is the measure of a commodity’s effectiveness to perform a designated function in a given environment (e.g., measured in terms of speed, durability, reliability, pressure, accuracy, efficiency). For software, the *form* means the design, logic flow, and algorithms. The *fit* is defined by its ability to interface or connect with a defense article. The *function* means the action or actions the software performs directly related to a defense article or as a standalone application. *Performance capability* means the measure of the software’s effectiveness to perform a designated function.

NOTE 5 TO PARAGRAPH (b)(3): With respect to a commodity, “equivalent” means its form has been modified solely for fit purposes.

NOTE 1 TO PARAGRAPHS (b)(4) AND (5): For a defense article not to be specially designed on the basis of paragraph (b)(4) or (5) of this section, documents contemporaneous with its development, in their totality, must establish the elements of paragraph (b)(4) or (5). Such documents may include concept design information, marketing plans, declarations in patent applications, or contracts. Absent such documents, the commodity may not be excluded from being specially designed by either paragraph (b)(4) or (5).

NOTE 2 TO PARAGRAPHS (b)(4) AND (5): For the purpose of this definition, “knowledge” includes not only the positive knowledge a circumstance exists or is substantially certain to occur, but also an awareness of a high probability of its existence or future occurrence. Such awareness is inferred from evidence of the conscious disregard of facts known to a person and is also inferred from a person’s willful avoidance of facts.

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§ 120.42 Subject to the Export Administration Regulations (EAR).

Items “subject to the EAR” are those items listed on the Commerce Control List in part 774 of the EAR and all other items that meet the definition of that term in accordance with § 734.3 of the EAR. The EAR is found at 15 CFR parts 730 through 774.

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